Supreme Court, U.S.
FILED
FEB 26 1996
CLERK

(2) 95-1393

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.; GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.; CHIAMORI FARMS, INC.; PHILLIPS FARMS, INC.; KOBASHI FARMS, INC.; TANGE BROS., INC.; NAGAO FARMS; NILMEIER FARMS; CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS; KOBASHI FARMS; NAKAYAMA FARMS, INC.; and MIHARA FARMS,
Cross-Petitioners,

vs.

DANIEL R. GLICKMAN, Secretary of Agriculture,
Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

THOMAS E. CAMPAGNE
(Counsel of Record)
CLIFFORD C. KEMPER
JEFFREY C. HEEREN
THE LAW FIRM OF
THOMAS E. CAMPAGNE &
ASSOCIATES
1685 North Helm Avenue
Fresno, California 93727
(209) 255-1637
Attorneys for Cross-Petitioners

Bowne of San Francisco, Inc., Law Printers (415) 362-2300

19PP

INDEX TO APPENDIX

	App. Page
Excerpts from Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.*	1a
Excerpts from the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*	3a
Excerpts from Title 7 of the Code of Federal Regulations	4a
Summary of Maturity Regulations for California Nectarines from 1979 through 1995	8a
Summary of Maturity Regulations for California Plums from 1979 through 1995	12a
Summary of Maturity Regulations for California Peaches from 1979 through 1995	14a

The Agricultural Marketing Agreement Act of 1937, Title 7 U.S.C. 601 et seq., provides in pertinent part:

608c(7) Terms Common To All Orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions.

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of any agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There

shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: *Provided*, That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.

* * *

608c(14)

Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rate share of expenses) shall on conviction, be fined not less than $50 or more than $5,000, for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided*, That if the court finds that petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

The Administrative Procedure Act, 5 U.S.C. 551 et seq., provides, in pertinent part:

552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency;

Title 7 of the Code of Federal Regulations provides, in pertinent part:

§ 51.1530 Mature.

"Mature" means that the fruit has reached the stage of maturity which will insure a proper completion of the ripening process.

§ 51.3153 Mature.

"Mature" means that the nectarine has reached the stage of growth which will insure a proper completion of the ripening process.

§ 916.30 Powers

The committee shall have the following powers:

(a) To administer the provisions of this part in accordance with its terms;

(b) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this part;

(c) To make and adopt rules and regulations to effectuate the terms and provisions of this part; and

(d) To recommend to the Secretary amendments to this part.

§ 916.51 Recommendations for regulation.

(a) Whenever the committee deems it advisable to regulate the handling of any variety or varieties of nectarines in the manner provided in § 916.52, it shall so recommend to the Secretary.

(b) In arriving at its recommendations for regulation pursuant to paragraph (a) of this section, the committee shall give consideration to current information with respect to the factors affecting the supply and demand for

nectarines during the period or periods when it is proposed that such regulations should be made effective. With each such recommendation for regulation, the committee shall submit to the Secretary the data and information on which such recommendation is predicated and such other available information as the Secretary may request.

§ 917.40 Recommendations for regulations.

(a) Whenever a commodity committee deems it advisable to regulate the handling of any variety or varieties of fruit in the manner provided in § 917.41, it shall so recommend to the Secretary.

(b) In arriving at its recommendations for regulation pursuant to paragraph (a) of this section, the commodity committee shall give consideration to current information with respect to the factors affecting the supply and demand for such fruit during the period or periods when it is proposed that such regulation should be made effective. With each such recommendation for regulation, the commodity committee shall submit to the Secretary the data and information on which such recommendation is predicated and such other available information as the Secretary may request.

§ 917.35 Powers and duties of each commodity committee.

Each commodity committee shall have the following powers and duties:

(a) With regard to the respective fruit for which it was established, to establish production research and marketing research and development projects as authorized under § 917.39, to recommend to the Secretary regulation of shipments pursuant to the provisions of this part, and to possess such other powers and exercise such other duties

as will properly effectuate the purpose of this part: *Provided, however*, That the Peach and Pear Commodity Committee shall each approve actions under § 917.39 and make said recommendations pursuant to §§ 917.40 through 917.43 only upon the affirmative vote of not less than nine members of each said committee: *Provided further*, That the Plum Commodity Committee shall approve such actions pursuant to § 917.39 or make said recommendations pursuant to §§ 917.40 through 917.43 only upon the affirmative vote of not less than eight members of said committee.

(b) To make such rules and regulations with respect to fruit for which it was established as may be necessary to effectuate the terms and provisions of this part.

(c) To forward to the Control Committee and to the Secretary a record of the minutes of each meeting of the commodity committee.

(d) To establish such other committees to aid the commodity committee in the performance of its duties under this part as may be deemed advisable.

(e) Each season prior to any recommendation to the Secretary for a regulation of shipments pursuant to §§ 917.40 through 917.43 to determine the marketing policy to be followed for the respective commodity during the ensuing fiscal period and to submit such policy to the Secretary, said policy report to contain, among other provisions, information relative to the estimated total production and shipments of the fruit by districts, information as to the expected general quality and size of fruit, possible or expected demand conditions of different market outlets, supplies of competitive commodities, such analysis of the foregoing factors and conditions as the committee deems appropriate, and the type of regulations

of shipments expected to be recommended for the respective fruit.

(f) To submit as soon as practicable after the beginning of each fiscal year to the secretary, for his approval, a budget of its expenses for such fiscal period, including its proportional share of the expenses of the Control Committee and an explanation of the items therein, and a recommendation as to the rate of assessment for the respective fruit for which the commodity committee was established.

(g) With the approval of the Secretary, to redefine the Districts into which the State of California has been divided under § 917.14 or change the representation of any representation area affecting the respective commodity committee: *Provided, however*, That if any such changes are made, representation on any such committee from the various representation areas shall be based, so far as practicable, upon the proportionate quantity of the respective fruit shipped from the respective representation area during the preceding three fiscal periods: *Provided further*, That the commodity committees shall follow the principle, so far as practicable, of assigning a member position on the commodity committees to any representation area from which five percent of regulated shipments have originated during such periods.

NECTARINE

For years prior to, and including 1979, the nectarine maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 916.352 Nectarine Regulation 10.

. . . no handler shall handle:

(1) Any package or container of any variety of nectarines unless such nectarines grade at least U.S. No. 1.

* * *

(b) As used herein, "U.S. No. 1" and "standard pack" mean the same as defined in the United States Standards for Grades of Nectarines (7 CFR 51.3145-51.3160): "No. 22D standard lug box" means the same as defined in section 1387.11 of the "Regulations of the California Department of Food and Agriculture," and all other terms mean the same as defined in the marketing order.

For the years 1980 through 1987, the nectarine maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 916.356 Nectarine Regulation 14.

. . . no handler shall handle:

(1) Any package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade: *Provided,* that maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal and FederalState Inspection Service; *Provided further,* That nectarines 2 inches in diameter or smaller, shall not have fairly light colored, fairly smooth scars which exceed the aggregate area of a circle ⅜ inch in diameter, and nectarines larger than

2 inches in diameter shall not have fairly light colored, fairly smooth scars which exceed and aggregate area of a circle ½ inch in diameter; *Provided further*, That an additional tolerance of 25 percent shall be permitted for fruit that is not well formed but not badly misshapen.

* * *

(b) As used herein, "U.S. No. 1" and "standard pack" means the same as defined in the United States Standards for Grades of Nectarines (7 CFR 2851.3145-2851.3160); "No. 22D standard lug box" means the same as defined in Section 1380.19(17) of the "Regulations of the California Department of Food and Agriculture."

Commencing in 1988 through the 1991 harvest seasons, the nectarine maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 916.356 Nectarine Regulation 14.

(a) No handler shall ship:

(1) Any lot or package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade, except that the nectarines shall be "well-matured" rather than "mature," but not overripe or shriveled . . .

* * *

(i) During the 1988 and subsequent seasons, the Federal or the Federal-State Inspection Service will use the maturity guides listed in Table I in making maturity determinations for the specified varieties. For these varieties, not less than 90 percent of any lot shall meet the color guide established for the variety, and an aggregate area of not less than 90 percent of the fruit surface shall meet the color guide established for the variety, except that for the Fairlane, Tom Grand, and 61-61 varieties of nectarines, not less than an aggregate area of 80 percent of the fruit surface shall meet

the color guide established for the variety. For varieties not listed, the Federal or Federal-State Inspection Service will use such tests as deemed to be proper by the Nectarine Administrative Committee and the Federal or Federal-State Inspection Service. A variance for any variety from the application of the maturity guides specified in Table I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an inappropriate measure of "well-matured." The maturity determination variance procedure is set forth as follows:

(b) *Definitions.* As used herein, "U.S. No. 1," "mature," and "standard pack" mean the same as defined in the United States Standards for Grades of Nectarines (7 CFR 51.3145 to 51.3160); "No. 22D standard lug box" means the same as defined in section 1380.19(17) of the "Regulations of the California Department of Food and Agriculture." "Well-matured" means a condition distinctly more advanced than "mature."

For the 1992 through 1995 harvest seasons, the nectarine maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 916.356 California Nectarine Grade and Size Regulation.

. . . no handler shall ship:

(1) Any lot or package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade: *Provided*, That nectarines 2 inches in diameter or smaller, shall not have fairly light colored, fairly smooth scars which exceed an aggregate area of a circle ⅜ inch in diameter, and nectarines larger than 2 inches in diameter shall not have fairly light colored, fairly smooth scars which exceed an aggregate area of a circle ½ inch in diameter: *Provided further*, That an additional tolerance of

25 percent shall be permitted for fruit that is not well formed but not badly misshapen. That Federal or Federal-State Inspection Service shall make final determinations on maturity through the use of color guides or such other tests as determined appropriate by the inspection agency.

* * *

(b) *Definitions.* As used herein, "U.S. No. 1," "mature," and "standard pack" mean the same as defined in the United States Standards for Grades of Nectarines (7 CFR 51.3145 to 51.3160); "No. 22D standard lug box" means the same as defined in section 1380.19(17) of the "Regulations of the California Department of Food and Agriculture." "Well-matured" means a condition distinctly more advanced than "mature."

PLUM

For years prior to, and including 1979, the plum maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 917.447 Plum Regulation 14.

. . . no handler shall ship any lot of packages or containers or any plums, other than the varieties named in paragraph (b) of this section, unless such plums grade at least U.S. No. 1.

* * *

(d) When used herein, "U.S. No. 1" and "serious damage" shall have the same meaning as set forth in the U.S. Standards for Fresh Plums and Prunes (7 CFR 51.1520-1538); and all other terms shall have the same meaning as when used in the amended marketing agreement and order.

For the years 1980 through 1987, the plum maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 917.460 Plum Regulation 19.

. . . no handler shall ship any lot of packages or containers or any plums, other than the varieties named in paragraph (b) hereof, unless such plums grade at least U.S. No. 1; *Provided,* That maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service.

* * *

(d) When used herein, "U.S. No. 1" and "serious damage" shall have the same meaning as set forth in the United States Standards for Fresh Plums and Prunes (7 CFR 2851.1520-2851.1538).

Commencing in 1988 through the 1990 harvest seasons, the plum maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 917.460 Plum Regulation 19.

(a)(1) No handler shall ship any lot of packages or containers of any plums unless such plums grade at least U.S. No. 1, except that the plums shall be "well-matured," rather than "mature" but not overripe or shriveled.

* * *

(2) During the 1988 and subsequent seasons, the Federal or Federal-State Inspection Service will use the maturity guides listed in Table I in making maturity determinations for the specified varieties. For these varieties, not less than 90 percent of any lot shall meet the surface color, flesh color or "spring" requirements established for the variety or not less than 90 percent of any lot shall meet the ground color standard established for the variety except that for the Ebony Variety, an additional lot tolerance of 17 percent shall be permitted for fruit not meeting the "spring" requirement. For varieties not listed, the Federal or Federal-State Inspection Service will use such tests as deemed to be proper by the Plum Commodity Committee and the Federal or Federal-State Inspection Service.

(3) A variance for any variety from the application of the maturity guides specified in Table I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an inappropriate measure of "well-matured." The maturity determination variance procedure is set forth as follows:

After 1990 the plum marketing order was no longer.

PEACH

For years prior to, and including 1979, the peach maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 917.446 Peach Regulation 10.

. . . no handler shall handle:

(1) Any package or container of any variety of peaches unless such peaches meet the requirements of U.S. No. 1 grade.

* * *

(d) Terms used in the amended marketing agreement and order shall, when used herein, have the same meaning as given to the respective term in said amended marketing agreement and order: "U.S. No. 1" and "standard pack" shall have the same meaning, respectively, as when used in the United States Standards for Peaches (7 CFR 51.1210-1223) . . .

For the years 1980 through 1987, the peach maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 917.459 Peach Regulation 14.

. . . no handler shall handle:

(1) Any package or container of any variety of peaches unless such peaches meet the requirements of U.S. No. 1 grade: *Provided*, That maturity shall be determined by the application of color standards by the Federal or Federal-State Inspection Service.

* * *

(d) As used herein, "U.S. No. 1" and "standard pack" mean the same as defined in the United States Standards for

Peaches (7 CFR 2851.1201-1223); and "No. 22D standard lug box" and "No. 12B standard fruit (peach) box" mean the same as defined in Section 1380.19(18) of the "Regulations of the California Department of Food and Agriculture."

Commencing in 1988 through the 1991 harvest seasons, the peach maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 917.459 Peach Regulation 14.

(a) No handler shall ship:

(1) Any lot or package or container of any variety of peaches unless such peaches meet the requirements of U.S. No. 1 grade, except that the peaches shall be "well-matured," rather than "mature," but not overripe or shriveled. (i) During the 1988 and subsequent season, the Federal or Federal-State Inspection Service shall use the maturity guides listed in Table I in making maturity determinations for the specified varieties. For these varieties, not less than 90 percent of any lot shall meet the color guide established for the variety, and an aggregate area of not less than 90 percent of the fruit surface shall meet the color guide established for the variety. For varieties not listed, the Federal or Federal-State Inspection Service will use such tests as deemed to be proper by the Peach Commodity Committee and the Federal or Federal-State Inspection Service. A variance for any variety from the application of the maturity guides specified in Table I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an

inappropriate measure of "well-matured." The maturity determination variance procedure is set forth as follows:

* * *

(d) As used herein, "U.S. No. 1," "mature," and "standard pack" mean the same as defined in the United States Standards for Grades of Peaches (7 CFR 51.1210 through 51.1223); and "No. 22D standard lug box" and "No. 12B standard fruit (peach) box" mean the same as defined in section 1380.19(18) of the "Regulations of the California Department of Food and Agriculture." "Well-matured" means a condition distinctly more advanced than "mature."

For the 1992 through 1995 harvest seasons, the peach maturity regulation within the Code of Federal Regulations read as follows:

7 C.F.R. § 917.459 California Peach Grade and Size Regulation.

. . . no handler shall ship:

(1) Any lot or package or container of any variety of peaches unless such peaches meet the requirements of U.S. No. 1 grade. The Federal or Federal-State Inspection Service shall make final determinations on maturity through the use of color chips or other tests as determined appropriate by the inspection agency.

(i) The Federal or Federal-State Inspection Service will use the maturity guides listed in TABLE I in making maturity determinations for the specified varieties when inspection to the "well matured" level of maturity. For these varieties, not less than 90 percent of any lot shall meet the color guide established for the variety, and an aggregate area of not less than 90 percent of the fruit surface shall meet the color guide established for the variety. For varieties not listed, the Federal or Federal-State Inspection Service will

use such tests as its deems proper. A variance for any variety from the application of the maturity guides specified in TABLE I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an inappropriate measure of "well matured."

(ii) If a grower or handler believes his/her fruit is meeting the appropriate maturity level but the fruit has not been so graded by the inspector, he/she may appeal the inspection by calling the officer-in-charge of the local Federal-State Inspection Service office to arrange for an on-site examination of the fruit.

* * *

(d) As used herein, *U.S. No. 1, mature*, and *standard pack* mean the same as defined in the United States Standards for Grades of Peaches (7 CFR 51.1210 through 51.1223); and *No. 22D standard lug box* and *No. 12(B) standard fruit (peach) box* mean the same as defined in section 1380.19(18) of the "Regulations of the California Department of Food and Agriculture." *Well-matured* means a condition distinctly more advanced than "mature."